

No.

IN THE
Supreme Court of the United States

DERRICK VAUGHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari
To The United States Court of Appeals
for the Seventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should the Court grant *certiorari* to determine whether improper in-court identifications performed at the behest of the prosecution deprived Petitioner Derrick Vaughn of his right to a fair trial.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Seventh Circuit were Petitioner Derrick Vaughn and Respondent United States of America.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (the “Seventh Circuit”) affirming the Petitioner’s conviction and sentence is reported at *United States v. Brown, et al.*, 973 F.3d 667 (2020), and is included in the appendix hereto (“App.”) at 2a-84a. The United States District Court for the Northern District of Illinois’s Memorandum & Opinion denied the Petitioner’s motion for judgment of acquittal and motion for a new trial is reported at *United States v. Chester, et al.*, 2017 U.S. Dist. LEXIS 124914. App. 85a-200a.

JURISDICTION

Petitioner appealed his conviction and sentence. The ensuing opinion by the Seventh Circuit was rendered on August 28, 2020. Petitioner's timely petition for rehearing was denied on February 1, 2021. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL PROVISIONS, STATUTES,
AND REGULATIONS INVOLVED**

CONSTITUTIONAL PROVISIONS—

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

RULES—

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

INTRODUCTION

Petitioner Derrick Vaughn was one of six defendants that proceeded to trial in a massive RICO case that took down the Hobos criminal enterprise. The trial spanned four months. Two-hundred and thirty-seven witnesses were heard from.

The prosecution prompted one of those witnesses – an eyewitness to a double murder that Petitioner alone stood accused of – to perform a courtroom identification of the Petitioner. The witness obliged. The witness then proceeded to testify at length about the murders he had witnessed and never once indicated that Petitioner was present or participated in the killings. After identifying the Petitioner in the presence of the jury, the witness was never asked another question about the Petitioner.

Earlier in the trial, on day two of testimony, the prosecution prompted a police detective to perform an in-court identification of the Petitioner. The detective performed the identification while in the course of identifying other defendants who appear in a photograph confiscated during a pursuant to a search warrant. The defendants in the photo are flashing Hobos gang signs. Petitioner Derrick Vaughn was not in the photo. The detective testified at length but was never asked another question about Petitioner nor did he provide any testimony about him.

The in-court identifications were calculated, unfair, probative of nothing, and damaging to the integrity, or public reputation of judicial proceedings.

STATEMENT OF THE CASE

Nine defendants were charged in a Superseding Indictment on September 14, 2014, including Petitioner Derrick Vaughn. Three pleaded guilty and six – including Petitioner – went to trial. Petitioner was charged in Count I with conspiracy to violate RICO, see 18 U.S.C. § 1962(d). Petitioner was also charged in Counts IV and V with the VICAR murders of Antonio Bluitt and Gregory Neeley. After a four-month trial, on January 4, 2017, the jury found Petitioner guilty on each Count against him.

Petitioner maintains that he was not a member of the Hobos enterprise nor did he conspire with the Hobos. Petitioner lacked all of the defining characteristics of the Hobos, such as: having Hobo tattoos; use of high-powered, exotic firearms; taking vacations together; owning expensive cars; partaking in robberies; and accumulating substantial wealth through gang activities.

Petitioner Derrick Vaughn argues that it was prosecutorial misconduct to have government witnesses Detective Daniel Brogan and murder eyewitness Maurice Perry perform in-court identifications of Derrick Vaughn in the presence of the jury. These witnesses identified Derrick at trial, then gave additional testimony regarding events – including a double murder in Perry’s case – without ever mentioning Derrick Vaughn again. These in-court identifications were plain error and extremely prejudicial in that they implicated Derrick Vaughn without evidence that he committed a crime or was a member of the Hobos.

Petitioner Derrick Vaughn filed a timely notice of appeal to the Seventh Circuit Court of Appeals on January 5, 2016. This is an appeal from a conviction

by jury on January 4, 2017, sentence of life in prison pronounced on August 18, 2017, and judgment docketed on September 7, 2017. Defendant filed a timely notice of appeal on September 13, 2017.

This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION

Federal Rule of Criminal Procedure 52(b) provides that “[a] plain error that affects substantial rights may be considered even though it was not brought to the [district] court’s attention.”

In this case, the failure of Petitioner’s trial counsel to bring the matter to the court’s attention is understandable for reasons discussed below. What is not understandable is why the trial and appellate courts allow this type of sharp practice, particularly in a criminal prosecution when life in prison is a potential outcome. To Petitioner’s knowledge, this Court has not issued any opinions bearing directly on the question presented here.

Even a narrow holding from this Court stating that it is plain error for a prosecutor to have an eyewitness to a murder perform an in-court identification of the accused without eliciting any additional testimony about the accused or his actions relative to said murder would be a positive result for all involved. It would not offend prosecutors or the criminal defense bar. Prosecutors in future cases would not dare use in-court identifications designed only to prejudice and establish guilt by association, as was done here. Reviewing courts would be relieved of the unpleasant analysis that concludes that these so-called “errors” were harmless. They are not. Indeed, there was no error here in the traditional sense of the word. There was a calculated and, unfortunately, repeatedly successful ploy to gain an unfair advantage against a defendant who by no means was a leader or prime mover in the Hobos enterprise.

Finally, the fact that the same improper tactic was used twice by prosecutors against the Petitioner

in the same trial is evidence that intervention by this Court is not just warranted, it is necessary. Given a license by a reviewing court to present evidence in this way, zealous prosecutors will no doubt reuse this tactic to gain unfair advantage, at the heavy cost of a defendant's rights and personal liberty. Doing it once with a detective of police examining a photo of gang leaders is too much. Doing it again with an eyewitness to a double murder is misconduct that cries out for judicial intervention. It is plain error.

A Supreme Court opinion acknowledging and forbidding this type of plain error would also serve to heighten the integrity and public reputation of judicial proceedings.

ARGUMENT

I. TWO IMPROPER IN-COURT IDENTIFICATIONS OF DEFENDANT DERRICK VAUGHN INFECTED THE TRIAL WITH UNFAIRNESS.

In the case at bar, there were two in-court identifications of Petitioner Derrick Vaughn that had no arguable probative value and were extremely prejudicial. It is Petitioner's contention that the identifications performed in the presence of the jury amount to prosecutorial misconduct. They were designed solely to mislead the jury on critical issues and ultimately deprived Petitioner of a fair trial.

a. The Identification by Detective Brogan

Early on in the trial, during the second day of testimony, Chicago Police Department Detective William Brogan testified for the government. During direct examination, Detective Brogan was tendered a photograph confiscated during the execution of a search warrant at defendant Gabriel Bush's apartment. Upon opening the exhibit, Brogan was asked what it was and he responded: "A photo of Mr. Bush and other folks here today."

The photo was admitted into evidence and passed around to the members of the jury. Detective Brogan was then asked to identify individuals in the photo, the first being Petitioner's co-defendant Paris Poe. After identifying Poe in the photograph, Detective Brogan was asked if he observed Poe in the courtroom. He answered in the affirmative and performed an in-court identification of Mr. Poe. At that point, the

following exchange takes place between the prosecutor and Detective Brogan:

- Q. The person to Paris Poe's immediate left [in the photo] in a white shirt, do you see that person?
- A. The person in the foreground?
- Q. Yes.
- A. Yes.
- Q. Do you recognize who that person is?
- A. Yes.
- Q. Who was it?
- A. Stanley Vaughn.
- Q. Do you know his nickname?
- A. Smiley.
- Q. Do you know Stanley Vaughn, a/k/a Smiley, to have a younger brother?
- A. I know him to have two younger brothers.
- Q. What are their names?
- A. Ingemar Vaughn, also known as Boo, and Derrick Vaughn, also known as D-Block.
- Q. How do you spell Ingemar?
- A. I-n-g-e-m-a-r.
- Q. Do you see Derrick Vaughn, a/k/a D-Block, in the courtroom?
- A. I do.
- Q. Would you point him out and indicate an article of clothing he's wearing for the record?
- A. Sure. Mr. Vaughn is all the way in the right corner with a gray, appears to be a sweater, and a shirt and tie.

After performing the in-court identification of Derrick Vaughn, the government had Detective Brogan identify three additional defendants (Gabriel Bush, Gregory Chester, and Arnold Council) in the photograph and in court, just as it had done with defendant Paris Poe. The defendants in the photo were all leaders of the Hobos. Derrick Vaughn was not.

After identifying Derrick Vaughn in court, Detective Brogan then testified that the men in the confiscated photo are making Hobos gang signs with their hands. Derrick Vaughn does not appear in the photograph. More, there is no evidence that Vaughn ever displayed Hobo gang signs.

**b. The Identification by Maurice Perry,
a/k/a “Reese-bo”**

Maurice Perry was a member of the Black Disciples street gang. Antonio Bluitt, the Black Disciples gang leader and murder victim, was married to Perry’s cousin. Perry was present on September 2, 2007, when Bluitt and Gregory Neeley were shot and killed. Petitioner Derrick Vaughn was the only defendant charged with these two murders.

During his direct examination by the government, Perry was shown a photograph of Petitioner’s brother, Stanley Vaughn, and asked if he knew Stanley. After confirming that he knew Stanley Vaughn by his nickname, “Smiley,” Perry was asked whether Stanley had any brothers. Perry testified that Stanley “Smiley” Vaughn had two brothers, Boo [Ingemar] and D-Block [Derrick]. Perry was asked by the prosecutor to look around the courtroom to see if D-Block [Derrick Vaughn] was present. Perry – an eyewitness to a double murder that Petitioner was charged with

– was then asked to stand and make a courtroom identification of Derrick Vaughn, which he did.

This in-court identification was the last time Maurice Perry mentioned or in any way referred to Derrick Vaughn. Perry’s subsequent testimony about what he observed did not mention, much less implicate, Derrick Vaughn in those murders. Hence, the in-court identification was probative of nothing and extremely prejudicial.

c. The In-Court Identifications of Petitioner were Prosecutorial Misconduct

The U.S. Constitution Bill of Rights under the Sixth Amendment guarantees the right to a speedy trial with an impartial jury for criminal defendants in federal courts. Petitioner contends that the two in-court identifications described above constitute prosecutorial misconduct and infected the proceedings with unfairness, depriving him of a fair trial. In reviewing a claim for prosecutorial misconduct, the court first addresses the alleged misconduct to determine whether it was in fact proper. *United States v. Corley*, 519 F.3d 716, 727 (7th Cir. 2008). If the conduct was improper, the court will next consider whether it prejudiced the defendant. *Id.*; *United States v. Serfling*, 504 F.3d 672, 677 (7th Cir. 2007). If there was a contemporaneous objection during either identification the court would review the matter under an abuse of discretion standard. *United States v. Miller*, 276 F.3d 370, 373 (7th Cir. 2002). However, in the case at bar, there was no contemporaneous objection from defense counsel nor was there a prompt and vigorous objection by the district court judge.

The lack of objection to the identification procedures is understandable here as defense counsel likely anticipated that the prosecutor would attempt to elicit additional testimony from the two witnesses that would somehow implicate or incriminate Derrick Vaughn. With both witnesses, that did not happen. The identifications themselves – one in the midst of identifying gang leaders throwing gang signs and the other coming from an eyewitness to a double murder – were meant to incriminate Petitioner, at least by association. The associations that the prosecutor clearly wanted the jury to make was that defendant Derrick Vaughn was a member of the Hobos and that he participated in the murders of Antonio Bluitt and Gregory Neeley.

The identification of Derrick Vaughn by Maurice Perry is even more problematic. The issue was not raised at trial and this normally means that this Court's review is limited to plain error. *Rosales-Mirales v. United States*, 138 S. Ct. 1897, 1901 (2018). Nevertheless, Perry is a witness to two murders that the government charged Derrick Vaughn with committing. Perry identifies Derrick Vaughn in court but offers no evidence about Derrick Vaughn participating in the two murders. There is no conceivable reason for the identification to have taken place unless the prosecution expected the witness to provide incriminating evidence against Derrick Vaughn. A reading of Mr. Perry's entire testimony makes it clear that was not the case. Therefore, the identification was prosecutorial misconduct, plain and simple.

d. Cumulative Error

The cumulative error doctrine provides that the aggregation of non-reversible errors, i.e., plain errors that do not individually necessitate a reversal and harmless errors, can yield denial of the constitutional right to a fair trial, thereby necessitating a reversal of the conviction. *United States v. Al-Moayad*, 545 F.3d 139, 178 (2nd Cir. 2008). The Supreme Court has repeatedly recognized that the cumulative effect of errors, even if they are harmless when considered singly, may amount to a violation of due process requiring reversal of a criminal conviction. *Id.* Petitioner contends that the cumulative effect of the two improper in-court identifications denied him a fair trial.

On review for plain error, a convicted defendant such as Derrick Vaughn must show that: (1) the error was not intentionally relinquished; (2) the error was plain; and (3) the error affected his substantial rights (i.e., he probably would not have been convicted absent the error); and (4) the error seriously impugned the judicial proceeding's fairness, integrity, or public reputation. *Rosales-Mireles*, 138 S. Ct. at 1901 (2018).

The identifications here were plain error that cast significant doubt on the guilt of Derrick Vaughn. One of Petitioner's primary arguments was that he was not a Hobo. The fact that Derrick Vaughn is never photographed displaying gang signs while carousing with the enterprise's leaders, or any other Hobo for that matter, is an important one. Indeed, whether Derrick Vaughn was a member of the Hobos or conspired with the Hobos were core issues of his guilt or innocence. Two of the government's cooperators never

even suggested that Derrick Vaughn was a Hobo. Kenneth Bland, for one, claimed to be a Hobo, yet Bland did not know who Derrick Vaughn is. Likewise, in his grand jury statement, Keith Daniels identified sixteen people by name that he claimed to know were Hobos. Daniels's list included all of the defendants that went to trial alongside Derrick Vaughn, with the very notable exception of Derrick Vaughn himself. Thus, it is hardly a stretch to say that Derrick Vaughn probably would not have been convicted absent the improper identifications.

Petitioner was the sole defendant charged with the murders of Antonio Bluitt and Gregory Neeley. Maurice Perry testified as an eyewitness to those two murders. There is no reason for the government to ask the witness to perform this in-court identification other than to establish that Derrick Vaughn was present at, and criminally responsible for, the two murders. While jurors are presumed to be capable of disregarding improper evidence unless it is so incriminating that they could not be expected to put it out of their minds, the improper evidence presented by way of the courtroom identifications in this lengthy and massive case is just the type that a juror would *not* be expected to put out of his/her mind. *See United States v. Danford*, 435 F.3d 682, 687 (7th Cir. 2006). This is particularly true in light of the fact that there was no contemporaneous objection to either identification.

The lack of a contemporaneous objection is understandable given that Derrick Vaughn's trial counsel would logically contemplate or expect the prosecution to offer some incriminating evidence regarding Derrick Vaughn at a point following the identification.

It is just that the expected testimony was never forthcoming with Detective Brogan or Maurice Perry.

Plain error “cannot be subtle, arcane, debatable, or factually complicated. It must be—plain; but it needn’t be blatant.” *United States v. Caputo*, 978 F.2d 972, 975 (7th Cir. 1992). The errors here are hardly complicated or debatable. At a minimum, this court should hold that it is plain error for the prosecution to have an eyewitness to a murder perform an in-court identification of the accused murderer without offering any testimony about the accused’s presence or actions at the murder scene.

In *Rosales-Mireles*, this Court noted that it “has never said that errors must amount to a ‘powerful indictment’ of the system, a phrase which implies by its terms that the only errors worthy of correction are those that rise to the level of grossly serious misconduct.” 138 S. Ct. at 1907. However they are characterized, the errors raised here cry out for correction.

CONCLUSION

For the foregoing reasons, Petitioner requests this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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